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Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR COMPANY, ET AL.
PETITIONERS

v.

CHRISTINE MAHNE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner correctly states the procedural history of the case and sets forth certain facts in the light most favorable to the petitioner. However, the petitioner tries to down play what are the most significant facts in this case in light of the specific approach to choice of law that was adopted by the Michigan Supreme Court in *Olmstead v. Anderson*, 428 Mich. 1, 400 N.W.2d 292 (1987). These facts are that Ford Motor Company is a Michigan corporation, with its world headquarters and principal manufacturing facilities in Dearborn, Michigan, and that all the facts relating to the design, manufacture and testing of the 1967 Ford Mustang took place in Dearborn. Ford conducts no manufacturing activities whatsoever in Florida.

The petitioner also only makes passing reference in a footnote to its position with respect to certification in the Court of Appeals. There the respondent filed a motion for certification of the choice of law issue to the Michigan Supreme Court. While maintaining that under the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*, Michigan law would not be displaced in favor of Florida law in the present case, the respondent observed that the fact-law pattern in the present case was not identical to the fact-law pattern in *Olmstead*, so that certification of the choice of law question to the Michigan Supreme Court would be appropriate. The petitioner vigorously opposed certification. The Court Appeals denied the motion for certification and resolved the choice of law issue itself.

In addition, the petitioner fails to point out that while its petition for certiorari is pending in this Court, the case is moving toward a trial on the merits in the District Court. The petitioner did not seek a stay of the proceedings in the District Court. The parties are now engaged in extensive discovery, and petitioner's response to the respondent's interrogatories and request for production of documents is due no later than November 1, 1990. The case has been set for jury trial on February 4, 1991. All that is required of the petitioner at this stage of the proceedings is that it defend the respondent's products liability claim under Michigan law in a federal court in Michigan.

Finally, the petitioner fails to discuss at all the specific approach to choice of law in Michigan that was adopted by the Michigan Supreme Court in *Olmstead*. This omission is startling, since the essence of the petitioner's argument in this Court is that the Court of Appeals committed some kind of "serious error" when it applied that approach to the facts of this case and reached a different result from that reached by the District Judge. The respondent will now briefly summarize Michigan's specific approach to choice of law.

In *Olmstead*, the Michigan Supreme Court adopted a specific approach to choice of law, which supersedes all prior choice of law decisions by the lower courts in Michigan. This specific approach was carefully reviewed by Judge Ryan in his unanimous opinion for the Court of Appeals in the present case.[1] Michigan's *lex fori* approach consists of three elements. *One*: The basic law is the law of the forum, Michigan, and the question in a conflicts case is whether that case "presents a situation in which reason requires that foreign law supersede the law of this state." 900 F.2d at 86, quoting *Olmstead*, 400 N.W.2d at 292. *Two*: The question of displacement of Michigan law is determined by the use of interest analysis, that is, by a consideration of the policies reflected in the laws of the involved states, and the interest of each state, in light of that policy, in having its law applied on the point in issue in the particular case. 900 F.2d at 87, citing *Olmstead*, 400 N.W.2d at 292. *Three*: When the state whose law is sought to be applied in preference to Michigan law has no interest in applying its law in order to implement the policy reflected in that law, Michigan law applies as the law of the forum. *Id.*[2]

In the present case, the Court of Appeals held that Michigan law applied as the law of the forum, because under the Michigan Supreme Court's application of interest analysis, Michigan would conclude that Florida had no interest in applying the

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[1] Judge Ryan served as a Michigan state trial court judge for nine years and as a Justice of the Michigan Supreme Court for ten years before his appointment to the United States Court of Appeals for the Sixth Circuit in December, 1985. Despite Judge Ryan's preference for the *lex loci delicti* rule in tort cases when he sat on the Michigan Supreme Court, 900 F.2d at 85,n.3, in the present case he was bound to follow and apply the specific approach to choice of law adopted by his former colleagues in *Olmstead* and did so.

[2] It is only where the foreign state is found to have an interest in having its law applied that an analysis of Michigan's interests becomes necessary. In the absence of such an interest, Michigan law applies as the law of the forum. 900 F.2d at 87, citing *Olmstead*, 400 N.W.2d at 292.

manufacturer-protecting policy reflected in its statute of repose in favor of a Michigan manufacturer that carried on no manufacturing activities in Florida and that designed, manufactured and tested the allegedly defective product in Michigan. 900 F.2d at 88-89.[3]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There Are No "Special and Important Reasons" Justifying Review by This Court in the Present Case.

The Petition for Certiorari in the present case is in flagrant violation of the longstanding principle that, "The [certiorari] jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Company v. Coty*, 262 U.S. 159, 163 (1923).). The present case involves nothing more than an application of settled principles of state law in a diversity case. The Court of Appeals unanimously held that under the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*, the Michigan Supreme Court would not displace Michigan substantive law in a products claim brought

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[3] Under Michigan's specific approach to choice of law, it is completely irrelevant whether or not Florida would apply its statute of repose in the event that the suit had been brought there. Since the Michigan courts would conclude that Florida did not have an interest in the application of its statute of repose to the facts of this case, the choice of law inquiry proceeds no further, and Michigan law applies as the law of the forum. Thus, as the petitioner seemingly fails to understand, there is simply no issue in this case as to the interpretation of Florida law by the Florida courts.

The Florida legislature repealed the statute of repose, effective October 1, 1986. While under Florida law, the repeal was not retroactive, so that the statute of repose could still be applied by the Florida courts to bar respondent's claim, the precise conflict of laws question in the present case could not arise again in a suit by a Florida victim against a Michigan manufacturer. In this sense, the present case is "one of a kind."

by an out-of-state victim against a Michigan manufacturer that designed, manufactured, and tested the allegedly defective product in Michigan. Unlike the District Judge, who completely ignored that approach and relied on a factually distinguishable and superseded decision of an intermediate appellate court, the Court of Appeals carefully applied that approach to the facts of the case at hand and predicted that the Michigan Supreme Court would hold that in this case, "since there is no rational reason to displace Michigan law, the presumptive *lex fori* rule directs that Michigan law governs this case." 900 F.2d at 89.

In a desperate attempt to get another hearing in this Court and to avoid defending the claim on the merits under Michigan law, Ford tries to make it appear that this case presents important "*Erie* questions," and accuses the Court of Appeals of "disregarding the fundamental principles established by this Court to guide a federal court's determination of state law. (Petition for Certiorari, p. 11). The gravamen of this charge is nothing more, however, than that the Court of Appeals disagreed with the District Judge on the question of whether Michigan law would be displaced on the facts of this case. According to Ford's flawed reasoning, every time the Court of Appeals reverses the District Judge on a state law question, it acts improperly, because it does not "defer to the District Judge's interpretation of state law" and renders a "*de novo* interpretation of often unfamiliar state law." (Petition for Certiorari, pp. 18-19).

This argument is utter nonsense, both as applied to the facts of the present case and to any situation where the Court of Appeals reverses a District Judge on a state law question. Carried to its logical conclusion, it would render a District Judge's decision on a state law question completely unreviewable in the Court of Appeals. That, of course, is not the law.[4] It

[4] If Congress wants to insulate state law questions from appellate review, it can do so by statute. Under present law, however, such questions are fully reviewable in the Court of Appeals. Interestingly enough, in its amicus brief in support of the respondent in *Salve Regina*, the present petitioner recognizes

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is one thing to give deference to a District Judge's determination of an unsettled question of state law, as in *Salve Regina College v. Russell*, 890 F.2d 484 (1st Cir. 1989), *cert.granted*, 58 U.S.L.W. 3834, 6/28/90. It is quite another thing for the Court of Appeals to "defer" to a District Judge's attempted application of settled principles of state law to the facts of a particular case, where the Court of Appeals finds that the "district court has not correctly applied local law, or if such interpretation of state law is fundamentally deficient in analysis or otherwise lacking in reasoned authority." *Gillette Dairy,Inc. v. Mallard Manufacturing Corp.*, 707 F.2d 351, 353 (8th Cir. 1983). So long as decisions of District Judges on state law questions are reviewable in the Court of Appeals, the Court of Appeals, while giving deference to the decision of the District Judge in an appropriate case, must review that decision and must set it aside whenever the District Judge has committed clear error.

In the present case, the District Judge not only committed clear error in his application of settled principles of Michigan conflicts law to the facts of the present case, but, to borrow from Ford's Petition for Certiorari, he "disregard[ed] the fundamental principles established by this Court to guide a federal court's determination of state law." Instead of applying to the facts of this case the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*, the District Judge gave controlling effect to a factually distinguishable decision of the Michigan Court of Appeals,[5] notwithstanding that this decision

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that "deference" does not mean "non-reviewability." "None of the courts of appeal has held that district court determinations of state law are *conclusively* presumed to be correct. To the contrary, the courts acknowledge that parties to diversity actions are entitled to meaningful appellate review of state law determinations." (Brief for the Ford Motor Company as Amicus Curiae in Support of Respondent, p. 7).

[5] This decision was *Hampshire v. Ford Motor Co.*, 155 Mich.App. 143, 399 N.W.2d 36 (1986), which the District Judge said, "presented virtually an identical state of facts" and which he found to be "controlling." However,

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had been superseded by the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*.

The most "fundamental principle" established by this Court to guide a federal court's determination of state law is that federal courts must determine state law "as declared by its legislature in a statute or by its highest court in a decision." *Erie R.Co. v. Tompkins*, 304 U.S. 64, 78 (1938). While a decision of an intermediate state court is "datum" for ascertaining state law, it may not be followed where the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise." *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). Once the Michigan Supreme Court adopted a specific approach to choice of law in *Olmstead*, that specific approach superseded all pre-*Olmstead* decisions,[6] and

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as the Court of Appeals noted, the facts of *Hampshire* were quite different from those of the present case in that in *Hampshire*, "the sole connections to Michigan were that the defendant's headquarters were there and the action was filed in that state," and in *Hampshire*, "the plaintiff did not object to the application of California law on the defendant's motion for summary judgment." 900 F.2d at 88. In the present case, by contrast, everything relating to the design, manufacturing and testing of the 1967 Ford Mustang occurred in Michigan, and,to say the least, the plaintiff strongly insisted on the application of Michigan law. In the present case, the Court of Appeals found that the District Judge erred in giving "controlling effect" to *Hampshire* and that *Hampshire* was distinguishable on its facts: "[w]e are satisfied that, on the facts before us, we need not make a comparative analysis of the interests of Michigan and the foreign state as was done in *Hampshire*." *Id.* Again, this was because in this case Florida had no interest in applying the manufacturer-protecting policy reflected in its statute of repose in favor of a Michigan manufacturer that carried on no manufacturing activities whatsoever in Florida and that designed, manufactured and tested the allegedly defective product in Michigan.

[6] After *Olmstead*, the Michigan Court of Appeals likewise was required to apply the specific approach of *Olmstead* to the choice of law question presented in a particular case. It did so in *Bonelli v. Volkswagen of America*, 166 Mich.App. 483, 421 N.W.2d 213 (1988) (which, curiously enough is cited by Ford in its Petition for Certiorari, p. 13, n.5), where it held that even

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a federal court seeking to ascertain Michigan conflicts law in a diversity case was bound to carefully apply the *Olmstead* approach to the choice of law question presented in the particular case. This is exactly what the Court of Appeals did in the present case, and this is exactly what the District Judge did not do. Thus, it was the District Judge who committed fundamental error, and the Court of Appeals could not compound this fundamental error by giving "deference" to a patently erroneous decision of the District Judge.

II. There Is No Connection Whatsoever Between the Question Presented in This Case and the Question Presented in Salve Regina College v. Russell.

The petitioner's efforts to "latch on" to this Court's grant of certiorari in *Salve Regina College v. Russell* are simply ludicrous. The issue in *Salve Regina* is whether in a diversity case a party is entitled to *de novo* review of a District Judge's determination of state law, so that the Court of Appeals can give no deference whatsoever to such determination. That case involved deference to the District Judge on a question of interpretation of unsettled state law - in a case of first impression whether the Rhode Island Supreme Court would apply the substantial performance standard to a contract between a student and a college - and the First Circuit held that such deference was appropriate on this question.[7] In the present case, by contrast,

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though New York law controlled the interpretation of the contract in question, Michigan tort law controlled the determination of the elements of the tort of intentional interference with a business relationship, since Michigan was the site of the alleged injury and of the plaintiff's residence. In that circumstance, the Court of Appeals, applying the *Olmstead* approach, concluded that no reason to displace Michigan law was shown. There is no post-*Olmstead* decision in which the Michigan Court of Appeals held that Michigan law was to be displaced in a torts case.

[7] As the First Circuit stated: "In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary

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there is no question of interpretation of unsettled state law: Michigan conflicts law is clear and is found in the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*. The only question in the present case involves the application of that specific approach to a choice of law issue arising under the facts of a particular case.

Moreover, the Sixth Circuit follows the same "customary appellate deference" approach to the District Judge's decisions on state law questions as does the First Circuit. In an appropriate case, deference will be given.[8] Thus, in *Diggs v. Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914, 925-927 (6th Cir. 1988), where the District Judge made careful findings of fact and conclusions of law and dealt with conflicting state law precedents, the Sixth Circuit found that, "the precedent supporting the District Judge is much more persuasive," and concluded that it should accept the "considered view" of the District Judge. On the other hand, in *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980), where the District Judge relied on a decision of a Tennessee intermediate appellate court to hold that Tennessee law would not recognize a cause of action for legal malpractice in the conduct of litigation, but ignored "inclusive language" in prior decisions of the Tennessee Supreme Court that would support recognition of such a cause of action, the Sixth Circuit found that the District Judge erred in his interpretation of state law.

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appellate deference accorded to interpretations of state law by federal judges of that state, we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." 890 F.2d at 489 (citations omitted).

[8] Interestingly enough, in its amicus curiae brief in support of the respondent in *Salve Regina*, the present petitioner lists the Sixth Circuit among the Courts of Appeal that follow the "customary appellate deference" approach (Brief for the Ford Motor Company as Amicus Curiae in Support of Respondent, p.6, n.10).

Since the present case does not involve a question of deference to the District Judge on a question of interpretation of unsettled state law, and since the Sixth Circuit follows the same "customary appellate deference" approach to state law decisions of the District Judge as does the First Circuit, this Court's decision in *Salve Regina College*, either way, will be of no benefit whatsoever to the present petitioner. If this Court holds that *de novo* review is required in all cases, then the petitioner's "failure to defer" claim necessarily fails. But if this Court agrees with the First Circuit that deference is proper in appropriate cases, it will be approving what the Sixth Circuit is already doing.[9]

Therefore, there is no conceivable reason for this Court to allow the petitioner to "latch on" to the grant of certiorari in *Salve Regina* in order to further delay the trial of respondent's claim on the merits in the District Court.

III. A Court of Appeals Is Not Required to Employ Certification Merely Because It Concludes That the District Court Erred in Its Application of Settled Principles of State Law

It is the height of arrogance for the petitioner, which vigorously opposed any certification to the state court in the Court of Appeals, to now argue that the Court of Appeals erred in failing to do the very thing that the petitioner said it should not do. The petitioner's argument is a variant of "heads I win, tails you lose." Its post-judgment conversion to the virtues of

[9] Since the petitioner agrees that the District Judge's determination of state law is not conclusively presumed to be correct and that parties in diversity actions are entitled to meaningful appellate review of state law determinations (See Brief of Ford Motor Company as Amicus Curiae in Support of Respondent in *Salve Regina*, p.7), it is difficult to see what the petitioner can legitimately be complaining about in the present case. What it is complaining about, of course, is simply that the Court of Appeals disagreed with the District Judge's application of Michigan conflicts law in the particular case and ruled in favor of the respondent instead of the petitioner.

certification is premised on the rather dubious assumption that Michigan conflicts law was "clear" insofar as it supported petitioner's position that Michigan substantive law should be displaced, but suddenly became "unclear" when the Court of Appeals disagreed with that position and held that Michigan substantive law should not be displaced. In the present case, Michigan conflicts law was "clear" throughout the litigation. It is the specific approach to choice of law that the Michigan Supreme Court adopted in *Olmstead*. The only problem in the present case was that the District Judge did not properly apply that specific approach to the choice of law issue in the present case, but instead found "controlling" a factually distinguishable and superseded decision of a state intermediate appellate court. The Court of Appeals corrected that error and properly applied the specific approach to choice of law adopted by the Michigan Supreme Court in *Olmstead*.

It is simply preposterous to argue that a Court of Appeals must certify a question to the state courts whenever it believes that the District Judge erred in his application of settled principles of state law. And contrary to what the petitioner is now arguing, this Court has indeed "established guidelines to govern federal courts' use of state law certification procedures." (Petition for Certiorari, p. 24). These guidelines were stated in *Lehman Brothers v. Schein*, 416 U.S. 386, 394 (1974): The use of certification in a given case rests in the sound discretion of the federal court.[10] In the present case, the Court of Appeals, at the petitioner's urging, refused to certify the choice of law question to the Michigan Supreme Court. As *Lehman* makes clear, it was well within its discretion to refuse to do so.[11]

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[10] In that case this Court held that it was up to the Court of Appeals to consider whether certification was proper and refused to order the Court of Appeals to certify the question to the state court.

[11] As now Chief Justice Rehnquist observed in *Lehman* at 394: "State certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law . . . But in a purely diversity

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CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence."